Magendran a/l Mohan v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–37 OF 2005
TENGKU BAHARUDIN SHAH, WAN ADNAN MUHAMAD AND SULONG MATJERAIE JJCA
22 APRIL 2010

Criminal Law — Penal Code — s 300 — Murder — Appeal against conviction and sentence — Circumstantial evidence — Whether trial judge erred in convicting appellant in reliance on wholly circumstantial evidence which did not point irresistibly to his guilt — Whether trial judge failed to appreciate appellant's evidence of alibi — Whether there were gaps in prosecution's case

On 14 August 2000, a supervisor in a pipe laying project stumbled upon the dead body of a female in the Slim River area, which during a post mortem was identified as that of Sujitha a/p Subramaniam ('the deceased'). The post mortem also revealed that the deceased died of ligature strangulation. Police investigation revealed that the deceased had visited her family in Ipoh on 12 August 2000 and left at about 2pm the next day with her lover, one Magendran a/l Mohan ('the appellant'), to return to the rented room in Petaling Jaya, which she shared with him. The appellant was the last person to be seen with the deceased, and the circumstantial evidence taken as a whole led to the conclusion that the murder was committed by the appellant while he and the deceased were returning from Ipoh. The appellant was accordingly charged with the murder of the deceased on 13 August 2000 at KM88, Perak between 2.15pm and 9pm. One of the deceased's two sisters testified that there was a quarrel between the appellant and the deceased when the deceased visited her family on 12 August 2000. Another sister of the deceased testified that when the deceased came to visit she was wearing certain pieces of jewellery and had brought along with her some other pieces. These pieces of jewellery were later recovered by the police from a pawnshop. The worker in the pawnshop gave evidence that the appellant had pawned the jewellery in question on 14 August 2000. The pawnshop receipt, bearing the appellant's name and identification card number, was recovered from the appellant's personal effects when he was arrested. The deceased's driving licence was also found in the appellant's wallet, while the deceased's handphone was found in the appellant's rented room. Although the appellant alleged that the money he obtained for the pawned jewellery was for the payment of the rent he did not know the actual rental amount payable because the deceased was responsible for the paying of the rent. The deceased's landlord testified that she had questioned the appellant about the deceased's whereabouts and that he had replied that she had gone to her friend's house the first time and then replied that he had killed her when

questioned again. The appellant's friend testified that the appellant had taken him to a place where the appellant had admitted having quarrelled with the deceased during their return from Ipoh on 13 August 2000. After subjecting the prosecution evidence to a maximum evaluation, the trial judge found that the prosecution had made a prima facie case against the appellant and called for the defence. The appellant, who chose to give evidence on oath, denied having committed the murder. The appellant went on to state that he had served a notice of alibi under s 402A(1) of the Criminal Procedure Code wherein he had admitted that the deceased was with him between 2.15pm to 4.45pm of 13 August 2000. He testified that after he had dropped her near Amcorp Mall at about 4.45pm to visit her friend he had returned to the rented room he shared with the deceased at about 5pm and only left the room for an hour from 6pm to 7pm to have his dinner. The trial judge found that the series of circumstances when taken together pointed to the irresistible conclusion that the appellant murdered the deceased on the day and within the time stipulated in the charge and that the explanation given by him was nothing more than a bare denial, which was insufficient to rebut the prosecution's case against him. The trial judge accordingly found the appellant guilty of murder and sentenced him to death. This was the appellant's appeal against that conviction and sentence. The appellant submitted that since the prosecution case against him was based wholly on circumstantial evidence the trial judge ought to have imposed a higher standard of onus of proof. As such the appellant submitted that the trial judge had erred in not holding that the circumstantial evidence relied upon by the prosecution did not point irresistibly to his guilt. The appellant also submitted, inter alia, that the trial judge had failed to appreciate the evidence of alibi he had advanced and that there were gaps in the prosecution's case.

Held, dismissing the appeal:

(1) There was no merit in the appellant's submission that the trial judge had erred in convicting him in reliance wholly on circumstantial evidence which did not point irresistibly to his guilt. Although circumstantial evidence was the basis of the case for the prosecution, the trial judge was not required to impose a higher standard of onus of proof. It was sufficient for the trial judge to say that he was satisfied as to the guilt of the appellant beyond reasonable doubt. The trial judge in the instant case had observed in his judgment that he had drawn his mind to the fact that the prosecution's case rested on strong circumstantial evidence and that this overwhelming evidence led to the irresistible conclusion that it was the appellant who caused the death of the deceased. From this it was clear that the trial judge had analysed all the strains of circumstantial evidence and he was right to find that all of them pointed to the guilt of the appellant and no one else (see paras 21–22, 24, 29 & 31).

(2) The trial judge had given a proper evaluation of the evidence of the appellant and the facts stated in the appellant's notice of alibi. There were no gaps in the prosecution case as alleged by the appellant. The trial judge was of the view that the defence of alibi did not cover the whole of the period from 2.15pm to 7pm and that the gap from 4.45pm to 7pm remained unexplained and was insufficient to rebut the prosecution's case against the appellant. As such, the trial judge was correct in his findings and in making an assessment that the appellant's defence had failed to raise any reasonable doubt on the case for the prosecution and there were no reasons to disagree with these findings. The trial judge had not imposed a higher standard of proof on the appellant as demonstrated in his overall judgment (see paras 32, 40–41, 50–51 & 62).

(3) Based on the testimonies of the various witnesses and an exhaustive evaluation of the evidence and facts and the application of legal principles to those facts it was found that the trial judge was correct to infer that the only person involved in the murder of the deceased was the appellant. The finding of facts by the trial judge were based on the actual evidence which was corroborated in material particulars by inferences reasonably and properly drawn from the other evidence adduced before him. In short, the circumstantial and corroborative evidence were overwhelming and the finding of facts should be endorsed on appeal (see paras 52–54 & 66).

[Bahasa Malaysia summary

Pada 14 Ogos 2000, seorang penyelia dalam projek memasang paip, terjumpa mayat seorang perempuan di kawasan Slim River, yang semasa bedah siasat dikenal pasti sebagai Sujitha a/p Subramaniam ('si mati'). Bedah siasat tersebut juga mendedahkan bahawa kematian si mati adalah disebabkan oleh cekikan pada ligatur. Siasatan polis mendedahkan bahawa si mati telah menziarahi keluarganya di Ipoh pada 12 Ogos 2000 dan pulang lebih kurang pukul 2 petang keesokan hari dengan kekasihnya, Magendran a/l Mohan ('perayu'), untuk kembali ke bilik sewanya di Petaling Jaya,yang dikongsi bersama perayu. Perayu merupakan orang yang terakhir dilihat bersama si mati, dan keterangan ikut keadaan dilihat secara keseluruhan membawa kepada kesimpulan bahawa pembunuhan tersebut dilakukan oleh perayu semasa perayu dan si mati sedang dalam perjalanan pulang dari Ipoh. Perayu dengan itu dituduh dengan pembunuhan si mati pada 13 Ogos 2000 di KM88, Perak di antara 2.15 petang dan 9 malam. Salah seorang daripada dua adik perempuan si mati memberi keterangan bahawa perayu dan si mati telah bertengkar apabila si mati menziarahi keluarganya pada 12 Ogos 2000. Seorang lagi adik perempuan si mati memberi keterangan bahawa apabila si mati datang menziarah, dia memakai barang kemas tertentu dan telah membawa bersamanya beberapa yang lain. Barang-barang kemas ini kemudiannya

ditemui oleh pihak polis daripada sebuah pajak gadai. Pekerja di pajak gadai tersebut memberi keterangan bahawa perayu telah memajak barang-barang kemas tersebut pada 14 Ogos 2000. Resit pajak gadai tersebut yang mempunyai nama dan nombor kad pengenalan perayu, dijumpai di antara barang-barang peribadi perayu semasa dia ditangkap. Lesen pemandu si mati juga ditemui di dalam dompet perayu, sementara telefon bimbit si mati ditemui di bilik sewa perayu. Walaupun perayu mendakwa bahawa wang yang diperoleh dari memajak barang kemas adalah untuk bayaran sewa dia tidak mengetahui jumlah sebenar sewa yang perlu dibayar kerana si mati yang bertanggungjawab untuk membayar sewa tersebut. Pemilik rumah si mati memberi keterangan bahawa dia menanyakan perayu tentang di mana si mati dan perayu menjawab bahawa si mati telah pergi ke rumah kawannya pada pertama kali dan menjawab bahawa dia telah membunuh si mati apabila ditanya sekali lagi. Rakan perayu memberi keterangan bahawa perayu telah membawanya ke tempat di mana dia mengakui telah bergaduh dengan si mati semasa mereka pulang dari Ipoh pada 13 Ogos 2000. Selepas membuat penilaian maksimum terhadap keterangan pihak pendakwaan, hakim bicara mendapati bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap perayu dan telah menyuruhnya membela diri. Perayu, yang memilih untuk memberikan keterangan secara bersumpah, menafikan bahawa dia telah melakukan pembunuhan tersebut. Perayu menyatakan bahawa dia telah menyerahkan notis alibi di bawah s 402A(1) Kanun Prosedur Jenayah di mana dia mengaku bahawa si mati berada bersamanya di antara 2.15 petang hingga 4.45 petang 13 Ogos 2000. Dia memberikan keterangan bahawa setelah menurunkan si mati berhampiran Amcorp Mall pada kira-kira 4.45 petang untuk melawat kawannya dia telah pulang ke bilik sewanya yang dikongsi bersama si mati pada kira-kira 5 petang dan hanya meninggalkan biliknya selama sejam daripada pukul 6 petang hingga 7 petang untuk makan malam. Hakim bicara mendapati bahawa siri keadaan dilihat secara bersama mengarah kepada kesimpulan yang tidak boleh disangkal bahawa perayu membunuh si mati pada hari dan dalam masa yang dinyatakan di dalam pertuduhan dan bahawa penjelasan yang diberikan olehnya tidak lebih daripada penafian semata-mata, yang tidak mencukupi untuk mematahkan kes pihak pendakwaan terhadapnya. Hakim bicara oleh itu mendapati perayu bersalah atas pembunuhan tersebut dan menjatuhkan hukuman mati terhadapnya. Ini merupakan rayuan perayu terhadap sabitan dan hukuman. Perayu menghujah bahawa oleh kerana kes pihak pendakwaan terhadapnya adalah berasaskan secara keseluruhannya terhadap keterangan ikut keadaan, hakim bicara sepatutnya menjatuhkan standard pembuktian yang lebih tinggi. Oleh itu perayu menghujah bahawa hakim bicara telah khilaf kerana tidak memutuskan bahawa keterangan ikut keadaan yang disandarkan oleh pihak pendakwaan tidak mengarah kepada kesalahannya secara mutlak. Perayu juga menghujah, antara lain, bahawa hakim bicara telah gagal untuk menghargai keterangan

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alibi yang diketengahkannya dan bahawa terdapat jurang di dalam kes pihak pendakwaan.

Diputuskan, menolak rayuan:

(1) Tidak ada merit di dalam hujahan perayu bahawa hakim bicara telah terkhilaf dalam menyabitkannya bersandarkan secara keseluruhannya pada keterangan ikut keadaan yang tidak mengarah secara mutlak kepada kesalahannya. Walaupun keterangan ikut keadaan merupakan asas bagi kes pihak pendakwaan, hakim bicara tidak perlu untuk memberikan standard pembuktian yang tinggi. Adalah mencukupi bagi hakim bicara menyatakan bahawa beliau berpuas hati dengan kesalahan perayu melampaui keraguan yang munasabah. Hakim bicara di dalam kes ini telah membuat pemerhatian di dalam penghakimannya bahawa dia telah mengarahkan mindanya kepada fakta bahawa kes pihak pendakwaan bergantung atas keterangan ikut keadaan yang kukuh dan keterangan yang kuat tersebut mengarah kepada kesimpulan yang tidak boleh disangkal iaitu perayu telah menyebabkan kematian si mati. Daripada ini, jelas bahawa hakim bicara telah menganalisis kesemua sudut keterangan ikut keadaan dan beliau adalah betul dalam membuat penemuan bahawa kesemuanya mengarah kepada kesalahan perayu dan bukan orang lain (lihat perenggan 21–22, 24, 29 & 31).

(2) Hakim bicara telah membuat penilaian yang sewajarnya bagi keterangan perayu dan fakta-fakta yang dinyatakan di dalam notis alibi perayu. Tidak ada jurang di dalam kes pendakwaan seperti yang didakwa oleh perayu. Hakim bicara juga berpendapat bahawa pembelaan alibi tidak merangkumi keseluruhan tempoh daripada pukul 2.15 petang hingga 7 petang dan jurang daripada pukul 4.45 hingga 7 petang masih tidak dijelaskan dan tidak mencukupi untuk mematahkan kes pihak pendakwaan terhadap perayu. Oleh itu hakim bicara adalah betul di dalam penemuannya dan dalam membuat penilaian bahawa pembelaan perayu telah gagal untuk membangkitkan keraguan yang munasabah ke atas kes pihak pendakwaan dan tidak ada alasan untuk tidak bersetuju dengan penemuan ini. Hakim bicara tidak meletakkan standard pembuktian yang tinggi ke atas perayu seperti yang ditunjukkan di dalam penghakimannya secara keseluruhan (lihat perenggan 32, 40–41, 50–51 & 62).

(3) Berdasarkan keterangan beberapa saksi dan penilaian menyeluruh keterangan dan fakta-fakta dan aplikasi prinsip undang-undang kepada fakta-fakta tersebut didapati bahawa hakim bicara adalah betul dalam membuat kesimpulan satu-satunya orang yang terlibat di dalam pembunuhan si mati adalah perayu. Penemuan fakta oleh hakim

bicara adalah berdasarkan keterangan sebenar yang butiran material disokong oleh inferens yang secara munasabah dan sewajarnya dibuat daripada lain-lain keterangan yang dikemukakan di hadapannya. Pendek kata, keterangan ikut keadaan dan sokongan adalah mencukupi dan penemuan fakta perlu mengendors rayuan (lihat perenggan 52–54 & 66).]

Notes

For cases on s 300 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1474–1497.

Cases referred to

Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Idris v PP [1960] MLJ 296, CA (refd)
Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)
Kamis v PP [1975] 1 MLJ 46, FC (refd)
Ku Lip See v PP [1982] 1 MLJ 194, FC (refd)
McGreevy v Director of Public Prosecutions [1973] 1 All ER 503, HL (refd)
Muniandy & Anor v PP [1973] 1 MLJ 179, FC (refd)
PP v Ku Lip See [1981] 1 MLJ 258 (refd)

Legislation referred to

Criminal Procedure Code s 402A(1)

Gurbachan Singh (Bachan & Kartar) for the appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Sulong Matjeraie JCA:

INTRODUCTION

[1] This appeal is filed against the decision of the learned High Court judge, Ipoh, Perak who found the appellant guilty of murder and sentenced him to death.

[2] The charge against the appellant was that he murdered Sujitha a/p Subramaniam on 13 August 2000 at KM88, Jalan Persekutuan Ipoh-Kuala Lumpur, Behrang Station, Batang Padang, Perak between 2.15pm to 9pm.

[3] After hearing the submissions of both learned counsel for the appellant and the learned deputy and after having considered the written submissions filed and authorities cited before us, we unanimously dismissed the appeal and affirmed the conviction and sentence imposed by the learned High Court

judge. We now state the grounds of our decision.

FACTS OF THE CASE

[4] The material facts are these. A body of a dead and bloodied face female wearing a dark coloured bra, clad in a pair of blue jeans was stumbled upon by SP2 Mohd Arif bin Pandak while supervising the pipe laying work for water supply project in Slim River area on 14 August 2000 at KM88 Lebuhraya Persekutuan Ipoh-Kuala Lumpur. While the neck of the dead body was tied with a plastic rope, her hands were tied over her head with a raffia string.

[5] During a post mortem, the dead body was identified as that of Sujitha a/p Subramaniam (I/C No 771003–02–5576) ('the deceased') by her mother, Puan Manonmoney a/p Murugiah (I/C No 511116–08–5224) and SP13 Cif Insp Somu a/l Supramaniam. This by itself is sufficient to dismiss the allegation made by the appellant in one of the grounds of appeal that there was no proper identification of the deceased during the post mortem.

[6] The forensic pathologist who did the post mortem examination certified that the deceased died of ligature strangulation. The post mortem report concludes: 'Her neck showed nylon string tightly applied around her neck. She also had sign of asphyxia in her eyes as there were petechiae in her eyes. There were ligature marks around her neck, bruise in the neck muscles and thyroid gland, and also fracture of hyoid bone on her neck.'

[7] Police investigation reveals that the deceased visited her family in Ipoh on 12 August 2000 but left at 2pm a day later with the appellant bound for Kuala Lumpur. It was further established that both the appellant and the deceased were lovers staying together in a rented room in Petaling Jaya, Selangor.

CIRCUMSTANTIAL EVIDENCE ADDUCED

[8] The evidence relied upon by the prosecution in this case was wholly circumstantial. We agree with the finding of the learned trial judge that the cumulative effect of the circumstantial evidence is that they point only and only to the appellant. For that reason it is proper to set out the more important facts and circumstances hereunder:

(a) Among others, two sisters of the deceased gave evidence for the prosecution. One was SP5, Susilia a/p Subramaniam and the other SP8, Suguna a/p Subramaniam.

(b) SP5 testified that the appellant and the deceased ('the couple') came back to their mother's house in Ipoh on a motorcycle on 12 August 2000. In the evening there was an altercation between the couple. The

appellant was angry and was heard saying to the deceased, 'saya akan ajar awak di sana'. Although SP5 cannot say why those words were uttered she however affirmed that *there was a quarrel between the couple*. Their conversation that evening revolved around the deceased's behaviour among which the appellant informed the deceased's mother about the 'love bites' found on the neck of the deceased.

(c) SP5 testified that she saw the couple leave for Kuala Lumpur at about 2pm the very next day on a motorcycle. That was the last time the deceased was seen alive by SP5.

(d) It is common ground that the appellant was the last person to be seen with and the last person to be with the deceased.

(e) The other sister, SP8 testified that when the deceased came to Ipoh on 12 August 2000 she was wearing some pieces of jewellery. She also brought along with her some pieces of jewellery which were kept in her handbag. Some pieces of jewellery marked as exhs P5, P6, P7 and P8 were recovered from a pawnshop in Petaling Jaya and were identified by SP8 as those owned by the deceased.

The evidence of SP4, Liew Ah Tong, a worker working at the Foong Joo Pawnshop, Petaling Jaya, Selangor who identified the appellant confirmed that it was the appellant who brought exhs P5, P6, P7 and P8 on 14 August 2000 at 11.45am to pawn those pieces of jewellery for an amount of RM320. A receipt, P10, was given to the appellant indicating that RM320 was paid to the appellant for the items pawned. P10 bore the name and identity card number of the appellant; a description of the items pawned and the amount paid for those items pawned. The appellant alleged that the money was for payment of rent. However the evidence of SP14 Apayamah a/p Applaidu suggests and confirmed by the appellant that it was the deceased who pays the rent to the house owner. The appellant admitted that he does not know the actual rental amount payable.

(f) SP14, through whom rental of the room, where the couple was staying was paid, also testified that on two occasions she asked for the deceased from the appellant. His reply was that the deceased had gone to her friend's house. After four days of not seeing the deceased, SP14 again asked the appellant the whereabouts of the deceased. This time the appellant replied that he has killed her! SP14 stated that she thought the appellant was merely joking but only realised that the deceased had died after the police came to her house about a week after the deceased went missing.

(g) SP14 also testified that the *rental was paid by the deceased*.

(h) SP15, Krishnamurthi a/l Kanaratnam testified that he was a friend of the appellant who was also known to him as Jeeva. He knew of the relationship between the couple. On one occasion, the appellant brought him on a motorcycle to a place along the highway showing the spot where the accused had a quarrel with the deceased. SP15 was shown a photograph (exh P3 Bahagian A — photo No 15) and he admitted that the place visited by him with the appellant looks the same as the place or spot shown to him in the said photograph. After visiting the site, SP15 said the appellant became restless. Inconsistent answers were given by SP15 as to the exact time he visited the spot but SP15 finally admitted that he and the appellant went to the site one week before the appellant was arrested. We agree with the finding of the learned trial judge in accepting this testimony from SP15.

(i) SP13, Cif Inspector Somu a/l Supramaniam, the investigating officer, told the court that in the course of his investigation he recovered various items and articles belonging to the couple. He recovered some pieces of jewellery belonging to the deceased from the pawnshop, a Motorola 'handphone' together with its 'SIM' card as well as the deceased's driving licence. While the Motorola 'handphone' belonging to the deceased was found in the rented house rented by the appellant, the driving licence of the deceased was found in the possession of the appellant together with a receipt, P10 from the pawnshop. Both were found in the wallet of the appellant at the time of his arrest by SP13.

[9] We are satisfied that the learned trial judge had properly subjected the prosecution evidence to a maximum evaluation and had rightly established that the prosecution had made a prima facie case against the appellant. We agree that the learned trial judge had properly advised the appellant of the three options available. The appellant chose to give evidence on oath.

DEFENCE OF THE APPELLANT

[10] The appellant testified and admitted that he and the deceased went to the house of the deceased's parents in Ipoh on 12 August 2000. They spent a night there before returning to Kuala Lumpur at 2.15pm the next day on a motorcycle.

[11] After about an hour's journey, they stopped at a petrol kiosk to get some petrol. After filling some petrol the deceased intimated that she had insufficient money to pay the house rental and straight away handed all the pieces of jewellery that she had to the appellant for pawning. They then proceeded with their journey to Kuala Lumpur.

[12] Upon reaching Taman Jaya near the Amcorp Mall, in Petaling Jaya, the deceased told him to drop her there to see a friend. The appellant thereafter headed for home reaching home at about 5pm. After a short rest he went out for dinner at about 6pm and was at home by about 7pm.

[13] The appellant met SP14 who enquired the whereabouts of the deceased to which the appellant said that he had dropped her as she wanted to see a friend.

[14] The very next day on 14 August 2000 the appellant went to pawn the pieces of jewellery owned by the deceased at Petaling Jaya Old Town.

[15] In the meantime SP14 continuously asked the deceased's whereabouts to which the appellant jokingly replied that he has killed her during the journey. SP14 thought that the appellant was merely joking but only realised that the deceased had died after the police came to her house a week later after the deceased went missing.

[16] The appellant, while acknowledging that SP15 was a close friend, however denies bringing SP15 to a place along the highway as testified by him. He further denies having stopped at KM88 during his journey home to Kuala Lumpur with the deceased on 13 August 2000.

[17] The appellant denies killing the deceased on 13 August 2000 and went on to state that he has served a notice of alibi under s 402A(1) of the Criminal Procedure Code to the learned deputy.

[18] In the notice of alibi (exh D85) the appellant admits that the deceased was with him between 2.15pm to 4.45pm on 13 August 2000.

GROUNDS OF APPEAL

[19] Altogether there are 21 grounds of appeal, inclusive of the amended grounds, filed at encl 14a by the appellant and these can broadly and loosely be classified into the following broad areas:

(a) the prosecution evidence rested purely on circumstantial evidence;

(b) the learned trial judge failed to appreciate the evidence of alibi as advanced by the appellant;

(c) there are gaps in the prosecution's case;

(d) there is more than one possible inference that could be derived at from the prosecution evidence; and

(e) standard of proof applied.

[20] We shall now examine the above broad areas of appeal.

The prosecution evidence rested purely on circumstantial evidence

[21] One of the complaints of learned counsel for the appellant was that the learned trial judge erred in not holding that the circumstantial evidence relied upon by the prosecution did not point irresistibly to the guilt of the appellant.

[22] At the outset it is necessary to correct the perception on the usage of the phrase 'evidence proved must irresistibly point to' for instance, the guilt of the appellant in a case where circumstantial evidence is the basis of the case for the prosecution.

[23] In fact it would suffice if the learned trial judge merely say that he is satisfied as to the guilt of the appellant is beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt per Suffian LP in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306 at p 310 (FC). This followed the House of Lords' decision in *McGreevy v Director of Public Prosecutions* [1973] 1 All ER 503.

[24] In other words it is sufficient for the learned trial judge to say that he is satisfied as to the guilt of the accused beyond reasonable doubt. We therefore agree with the learned trial judge in not imposing a higher standard of onus of proof.

[25] As to the definition of 'circumstantial evidence', I can do no better than quote what the learned trial judge said in *Idris v Public Prosecutor* [1960] MLJ 296 at p 297 (CA):

> With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case of *Belhaven and Stenton Peerage; claim of James Hamilton of Stevenson; claim of Lieut-Col Hamilton of the Grenadier Guards* reported in (1875) 1 App Cas 278 at p 279:
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> > My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

> In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all.

[26] In *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307 (CA), Thomson CJ (as he then was) in giving the judgment of the Court of Appeal said at p 307(D), 'That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?'

[27] In *Kamis v Public Prosecutor* [1975] 1 MLJ 46, *the Federal Court approved the standard of proof in a case where the evidence against the appellant was entirely circumstantial when it said that*: 'for a court to rely on circumstantial evidence the evidence when considered must point only to the guilt of the accused; it must not be capable of any other interpretation or any other meaning'.

[28] *It has always been emphasised that 'wherever circumstantial evidence is relied on by the prosecution in building up its case against an accused person, any such piece of evidence must tend only in direction, that is to say, suggest or lend support to an inference of guilt*': see *Muniandy & Anor v Public Prosecutor* [1973] 1 MLJ 179.

[29] It can be observed in the judgment of the learned trial judge in this instant case that he had precisely drawn his mind to the fact that the prosecution's case rested on strong circumstantial evidence as outlined above. Such circumstantial evidence against the appellant is, in our view, simply overwhelming in that all this evidence drives you to the irresistible conclusion that it was the appellant who caused the death of the deceased.

[30] It is pertinent to say here that we agree that the above mentioned series of circumstances and coincidences are in our humble opinion, when considered together, pointed conclusively to the guilt of the appellant.

[31] We agree further that the learned trial judge had analysed all the strains of circumstantial evidence and we therefore agree with his finding that all of them point to the guilt of the appellant and no one else. There is no merit on

this ground of appeal.

The learned trial judge failed to appreciate the evidence of alibi as advanced by the appellant

[32] We find that the learned trial judge had given a proper evaluation of the evidence of the appellant and the facts stated in the appellant's notice of alibi. It was the learned High Court judge's finding that the appellant was at home from about 7pm onwards. It was also his finding that another part of the alibi remained unexplained when he said at p 40 of the appeal record thus:

> However that leaves another part of the alibi which the accused has not been able to explain, namely the time lapse between 2.15pm and 7pm. Not much has been offered by the accused except by saying that he was on a journey with the deceased to Kuala Lumpur at about 2.15pm and dropping her at Petaling Jaya. The accused admits that he was with the deceased and merely explain (sic) that after dropping the deceased at about 4.45pm in Petaling Jaya, he headed for home. No witness was called by the accused to support his story that he was at home at 5pm and then going out to eat at 6pm and coming back home at 7pm. Was the accused at home between those times? I am aware that no adverse inference against the accused may be drawn by reason of his failure to call any witness to back up his story. All the accused has to do is create a reasonable doubt (see *Goh Ah Yew v Public Prosecutor* [1949] MLJ 150).

Finding of the learned trial judge

[33] The evidence presented constituted in the mind of the learned trial judge a series of circumstances taken together pinpoint to one irresistible conclusion that the appellant murdered the deceased on the day and within the time stipulated in the charge.

[34] The evidence of the appellant pawning some pieces of jewellery belonging to the deceased considered in the light of all the circumstances of the case forms one of the series of circumstantial evidence against the appellant.

[35] Personal belongings of the deceased like her driving licence which can be used for identification, her mobile phone should have been in her possession were respectively found in the wallet and the house of the appellant. The finding made by the learned trial judge was that the mobile phone and the 'SIM' card belong to the deceased.

[36] The appellant told SP14 that he killed the deceased on at least two occasions.

[37] There was the evidence of SP15 who testified that the appellant took him to a place where the appellant had a quarrel with the deceased. This evidence was not totally rejected by the learned trial judge. The learned trial judge also observed in his judgment that when SP15 was giving evidence he was hardly cross-examined. It was neither suggested nor put to SP15 that it was not the appellant who insisted on going back to look for the deceased but SP15 himself. SP15 was not challenged as to the behaviour of the appellant of becoming restless when the body of the deceased was not found there. We agree with the learned trial judge that being unchallenged, it will amount to an acceptance of the testimony of the witness and it was reasonable for the evidence of SP15 to be accepted.

[38] In the words of the learned trial judge it was accepted as to have constituted yet another strand of evidence in the many strands of evidence required to form a rope strong enough to hang the appellant.

[39] In determining the issue of alibi, we are guided by the decision of Abdul Hamid FJ (as he then was) who delivered the judgment of the court in *Ku Lip See v Public Prosecutor* [1982] 1 MLJ 194 where he elaborated as follows:

> A determination whether particular evidence is evidence in support of alibi entails a consideration whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed. It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that, 'What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may not involve absolute impossibility, but only high improbability and yet be convincing' (see Criminal Law Review (1978) p 277 and also on p 278 where it is further stated that 'a true alibi defence consists of a affirmative proof of the defendant's presence somewhere other than at the time and place alleged').

[40] The learned trial judge was of the view that in its totality the explanation given by the appellant amounts to nothing more than a bare denial. Bare denial defence is not much of any assistance to the appellant: see *Public Prosecutor v Ku Lip See* [1981] 1 MLJ 258.

[41] The defence of alibi covers the period from 2.15pm to 7pm on 13 August 2000. Apart from saying that he has dropped the deceased at Petaling Jaya at 4.45pm, the 'other period' from 2.15pm to 7pm has not been accounted for. This gap, a period in the view of the learned trial judge reasonable enough to commit the offence as charged, remains unexplained. It is insufficient to

rebut the prosecution's case against him. In this respect, we have no reason to disagree with the reasons given by the learned trial judge.

There are gaps in the prosecution's case

[42] The appellant contended that there are gaps in the prosecution's case. However looking at the appeal record, it is difficult not to accept the findings of the learned trial judge.

[43] There is no dispute that the couple came to Ipoh on 12 August 2000 and they went back together on a motorcycle heading for Kuala Lumpur the following day. An altercation took place in the house in Ipoh where the appellant was seen to be angry and promised to 'reprimand' the deceased. This was the evidence of SP5.

[44] Another sister of the deceased testified that when the deceased came to visit Ipoh she was wearing some pieces of jewellery and brought along with her some other pieces which were produced and marked as exhs P5, P6, P7 and P8. All these exhibits were recovered by SP13 from a pawnshop in Petaling Jaya.

[45] The worker in the pawnshop SP4 gave evidence that the appellant had on 14 August 2000, the next day after his return from Ipoh at about 11.45am came to pawn those pieces of jewellery namely P5, P6, P7 and P8.

[46] A receipt, P10, was issued by SP4 to the appellant certifying that RM320 was paid to the appellant in respect of those items of jewellery pawned. In issuing P10, SP4 informed the court that the particulars stated in the receipt as to the identity of the person and the items pawned had been verified before they were keyed into the computer. P10 bears the name and identification card number of the appellant as well as the description of the items of jewellery pawned and the amount paid for those pawned items. Exhibits P5, P6, P7 and P8 were seized by the police from the pawnshop on 21 August 2000.

[47] The pawnshop receipt (P10) was seized from the appellant at the time of his arrest by SP13.

[48] Among the items recovered from the appellant during his arrest were those pieces of jewellery belonging to the deceased from the pawnshop, a Motorola handphone together with its 'SIM' card as well as the driving licence of the deceased. While the handphone of the deceased was found in the house rented by the appellant the driving licence of the deceased together with P10 was found in the wallet of the appellant by SP13.

[49] It is our view that it is highly improbable that the deceased would surrender her pieces of jewellery, her handphone, her driving licence only to have the jewellery pawned for a pittance. Indeed this runs in direct contradiction with the story of the defence that the deceased asked the appellant to leave her at Amcorp Mall in Petaling Jaya after handing over all her personal items of value to the appellant.

[50] We are of the considered view that the learned trial judge was correct in making an assessment of the defence of the appellant and that the defence has failed to raise any reasonable doubt on the case for the prosecution.

[51] It is therefore our view that there is no gap in the prosecution's case. It does not only confirm the case for the prosecution but corroborates the evidence adduced. The appeal on this ground is therefore without any basis.

There is more than one possible inference that could be derived at from the prosecution evidence

[52] Based on the testimonies of the various witnesses and the exhaustive evaluation of the evidence and facts and the application of legal principles against those facts, we are in agreement with the findings and the conclusions made by the learned trial judge.

[53] There is only one inference. There was only one person involved in the commission of the offence of the murder of the deceased. The appellant is that person. There has been no error in the conclusion made by the learned trial judge.

[54] The learned trial judge had made a finding of facts based on the actual evidence which was corroborated in material particulars by inferences reasonably and properly drawn from the other evidence adduced before him.

[55] The appeal under this head cannot therefore be sustained.

Standard of proof applied

[56] Learned counsel for the appellant raised the issue of the standard of proof applied by the learned trial judge by pointing out that at p 49 of the appeal record the following phrase was used:

> Accordingly, in my judgment the defence has not, on the balance of probabilities, cast any doubt on the prosecution's case and I therefore find the accused guilty as charged.

[57] Quoting from *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421 all that the appellant need to do is to raise a reasonable doubt that he was the person at the scene of the crime. Applying a heavier burden, learned counsel argued, would result in a misdirection warranting interference of this court.

[58] We are of the view that the above phrase was more of verbosity and not a reflection of the actual standard of proof imposed by the learned trial judge in his entire judgment. At p 40 of the appeal record the learned trial judge said:

> I am aware that no adverse inference against the accused may be drawn by reason of his failure to call any witness to back up his story. All the accused has to do is *create a reasonable doubt*. (Emphasis added.)

[59] Similarly at p 41 he said:

> As I have already said, the defence need not prove anything. All that the accused has to do is to raise *a reasonable doubt*. Even if I do not accept or believe the explanation given by the accused, that explanation must be able to raise *a reasonable doubt* in order to entitle him to an acquittal. (Emphasis added.)

[60] Further on the same page the learned trial judge said:

> Of course he says that he was with the deceased and that the deceased was still alive when he dropped her at Petaling Jaya at about 4.45pm, but that is insufficient to cast *any reasonable doubt on my mind*.

[61] At p 42 the learned trial judge outlined what he viewed as what the appellant needs to do when he said:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in such an instance the court cannot convict the accused unless it is satisfied that the version given by the accused *has not raised a reasonable doubt*. (Emphasis added.)

[62] It is our view therefore the learned trial judge did not impose a higher standard of proof required of the appellant as demonstrated in his overall judgment.

[63] The appeal under this heading must also fail.

[64] Learned counsel for the appellant also touched on the finding of the learned trial judge on the sample which was found to bear seminal stain at p 47 of his judgment. However before that, it was pointed out by the learned trial

judge that the evidence of the pathologist did indicate that there was an old tear in the deceased's vagina and she was having period and was wearing a sanitary pad at the time. It was also His Lordship's finding that the deceased was still wearing panties and had pad at the perineal region. The pathologist also found another layer of white inner pad covering the vulva region. Indeed it was his finding that the deceased was having her period. As such any submission to the effect that the deceased was sexually assaulted is without any basis and is mere conjecture.

[65] There are other grounds of appeal on which the appellant relied on and which were discussed during the argument before this court. In our opinion there is no substance in any of them.

[66] We find that the finding of the learned trial judge was not against the weight of evidence. To sum up the evidence, though circumstantial, was convincing. We are of the opinion that the conviction of the appellant is supported by the evidence on material particulars. These material particulars implicated the appellant. Having regard to all the strains of the circumstantial evidence, they all point to the appellant. In short, the circumstantial and corroborative evidence are overwhelming and the finding of facts should be endorsed on appeal.

[67] It was for the above reasons that after careful consideration we dismissed this appeal and affirmed the decision of the learned trial judge.

Appeal dismissed.

Reported by Kohila Nesan